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APR -2 2010
JEANNE HICKS, Clerk
BY ~~B. ROEHE~~
DEPUTY

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S MOTION FOR CHANGE OF
JUDGE FOR CAUSE PURSUANT TO
ARIZONA RULES OF CRIMINAL
PROCEDURE, RULE 10.1

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, submits its Motion for Change of Judge for Cause pursuant to *Ariz. R. Crim. P.*, Rule 10.1. The State's Motion is supported by the following Memorandum of Points and Authorities and the attached Affidavit.

MEMORANDUM OF POINTS AND AUTHORITIES

On Wednesday, March 30, 2010, in a discussion with counsel in the chambers of Judge Lindberg, prior to a Rule 404(B) hearing, Judge Lindberg stated that he did not think this case would not make it to the penalty phase of the trial. (See attached AFFIDAVIT of Deputy County Attorney Joseph Butner.) The comment by Judge Lindberg raises significant concerns about his impartiality in this case and causes an appearance of impropriety. The comment further suggests that Judge Lindberg has formed a predisposition or opinion regarding the

1 State's evidence and that he is not impartial. This comment further demonstrates favoritism
2 towards Defendant and gives the appearance that Judge Lindberg has surrendered his
3 independent judgment. The State therefore files this Rule 10.1 action because Judge Lindberg
4 has demonstrated he no longer can be a fair and impartial jurist in this case.

5 Rule 81 of the *Rules of the Supreme Court*, Canon 1, Rule 1.2, requires that "[a] judge
6 shall act at all times in a manner that promotes public confidence the independence, integrity,
7 and impartiality of the judiciary, and shall avoid impropriety and the appearance of
8 impropriety." Canon 2, Rule 2.11(A)(1) mandates that a judge shall disqualify himself "in any
9 proceeding in which the judge's impartiality might reasonably be questioned" where "[t]he
10 judge has a personal bias or prejudice concerning a party." Canon 2, Rule 2.3(B) mandates
11 that "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest
12 bias or prejudice."
13

14 [O]pinions formed by the judge on the basis of facts introduced or
15 events occurring in the course of the current proceedings, or of prior
16 proceedings, do not constitute a basis for a bias or partiality motion
17 unless they display a deep-seated favoritism or antagonism that would
18 make fair judgment impossible. *Liteky v. United States*, 510 U.S. 540,
555-56, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994).

19 *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997).

20 *Ariz. R. Crim. P.*, Rule 10.1 provides that "the state or any defendant shall be entitled to
21 a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest
22 or prejudice of the assigned judge." "The fact that a judge may have strong feelings about a
23 case or an opinion about the merits does not mean that the judge is biased and prejudiced and
24 must recuse himself from the case. *State v. Peralta*, 175 Ariz. 316, 319, 856 P.2d 1194, 1197
25 (App.1993). "Bias and prejudice means a hostile feeling or spirit of ill-will, or undue
26 friendship or favoritism, towards one of the litigants." *State v. Myers*, 117 Ariz. 79, 86, 570

1 P.2d 1252, 1259 (1977) (quoting *In re Guardianship of Styer*, 24 Ariz.App. 148, 151, 536 P.2d
2 717, 720 (1975).

3 The fact that Judge Lindberg has formed an opinion on the strength of the State's
4 evidence before he has heard *all* of this evidence puts the State at a distinct and unfair
5 disadvantage. The State is entitled to a trial that will be fair and impartial. If Judge Lindberg
6 believes this case will not make it to the penalty phase, after already finding by a probable
7 cause standard of proof that three (3) death penalty aggravators exist, it will be impossible for
8 the State to have a level playing field. The Judge's opinion will and perhaps already has
9 interfered with his independent, impartial judgment. The State cannot have fair and impartial
10 rulings that must be made on important subsequent evidentiary rulings. This Judge's lack of
11 impartiality will result in evidentiary rulings influenced by the bias and prejudice of the judge
12 which prevents the State from receiving a fair trial.
13
14

15 CONCLUSION

16 The State respectfully requests a hearing pursuant to Rule 10.1 where Judge Lindberg
17 will be asked to testify to determine his impartiality, his independent judgment and this
18 appearance of impropriety.

19 RESPECTFULLY SUBMITTED this 21 day of April, 2010.

20
21
22 Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

23
24 By: _____

25 Joseph C. Butner
Deputy County Attorney
26

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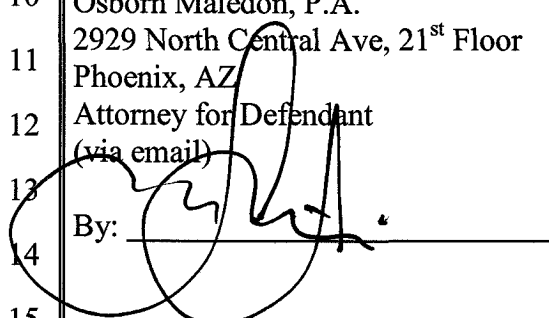
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1 COPIES of the foregoing delivered this
2 2d day of April, 2010 to:

3 Honorable Thomas J. Lindberg
4 Division 6
5 Yavapai County Superior Court
6 (via email)

7 John Sears
8 107 North Cortez Street, Suite 104
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